

# **JUSTICE AS THE SOUL OF SOCIAL ORDER: A COMPARATIVE ANALYSIS OF ISLAMIC & WESTERN APPROACH**

By  
**Dr. Khalid Mehmood Iraqi \***

## **Abstract:**

All mathematical and economic potentials and advancements in technology carry value and significance only when our social order is based on justice and equality. Justice means defense of the rights of individuals, exhibiting spirit of courage and conviction. In the contemporary world state and government are confronted with the problem of maintaining social justice and order. This paper seeks to compare the western concept of justice and equality with the Islamic one, leading to improving our understanding about justice, equality, status of man and overall social order. Islamic concept of social order is universal in nature and more comprehensive than the western approach.

## **Introduction:**

### **Western Concept of Justice**

The relationship between society and government has always preoccupied political philosophers and thinkers. A government does not and cannot operate in

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\* - Students' Advisor, University of Karachi.

## **The Contract of Guarantee**

isolation, nor remains unaffected by the society of which it forms part. The governments' ability to provide justice to its citizens is the foundation of this relationship. In the contemporary world, the challenge of maintaining social order based on justice has generated much symbolic and emotional debate. Establishment of justice implies restoration of the rights of the person who is entitled to it and depriving the person of the right to which he is not entitled.

## **Islamic Concept of Justice**

The Holy Qura'n explicitly lays down the supremacy of justice as will be evident from the following verse:

﴿قُلْ أَمَرَ رَبِّي بِالْقِسْطِ﴾

"say: My Lord has commanded (you) to do justice,,<sup>1</sup>

Justice is the heart and soul of Islamic social order. One of the basic contributions of Islam to the mankind is the concept of social order based on social justice. A community having a sense of social justice will look after the needs of the entire population, keeping in mind collective needs, without any prejudice or favor. In social justice, it is the duty of every individual member of the community to co-operate with each other towards attainment of this end, to the best of his ability. To inculcate such spirit, all members of the community have to be treated equally. Therefore, the first principle of the Islamic state is human equality.

The Qura'an says:

"O mankind! Be careful of your duty to your Lord

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<sup>1</sup> - AI-Quran (7:29).

## The Contract of Guarantee

who created you from a single soul and from it created its mate and from them hath spread abroad a multitude of men and women,,<sup>1</sup>

Qura'an Text:

﴿يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ  
وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا  
وَنِسَاءً﴾

Islam explicitly emphasizes that its economic, political and social order be based on justice, and strictly advises those who are in authority, to augment and promote the cause of justice in their administrative and executive spheres.

Sense of justice is the most wonderful ideal of Islam, which is neither mystic nor imaginary, but bears practical ethics for the conduct of life. The concept of justice under this approach manifests the real spirit of human equality and dignity. Equality has no meaning without human dignity, which is assigned due consideration is Islamic social order. The western concept of justice, on the other hand, ignores the element of human dignity, which is not possible without embracing all forms of justice - social, legislative, political and economic.

Islam as a code of life encircles all these manner of justice by declaring:

"And that ye should deal justly with orphans ,,"<sup>2</sup>

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<sup>1</sup> - AI-Quran (4:1).

<sup>2</sup> - AL -Quran (4:127)

## The Contract of Guarantee

Qura'an Text:

﴿... وَأَنْ تَقُومُوا لِلْيَتَامَىٰ بِالْقِسْطِ﴾

This injunction is about maintaining social justice in a society. Social justice according to Islamic tenets, is the protection of everyone - rich or poor, men and women, rulers and the ruled. The weak section of the society has not been ignored, rather especial care has been taken for such segment of the society.

"And, if you judge between mankind that ye judge justly,"<sup>1</sup>

Qura'an Text:

﴿وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ﴾

The Ouran also takes into account the legislative responsibilities. The legislators have both legal and moral responsibility to serve the cause of justice while constituting the law of the land. The legislators are to follow the path of justice as laid down in Ouran. There can't be any legislation that might bring forth any sort of discrimination.

The Ouranic commandments regarding political and economic justice are:

"And let not hatred of any people seduce you that ye deal not justly. Deal justly, that is near to taqwa'"<sup>2</sup>

**Qura'an Text:**

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<sup>1</sup>- AI-Quran (4:58).

<sup>2</sup>- AI-Quran (5:8).

﴿وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ ۤأَلَّا تَعْدِلُوا ۖ اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ﴾

"And those who, when they spend, are neither prodigal nor grudging and there is ever a firm station between the two'<sup>1</sup>

**Qura'anic Text:**

﴿وَالَّذِينَ إِذَا أَنفَقُوا لَمْ يُسْرِفُوا وَلَمْ يَقْتُرُوا وَكَانَ بَيْنَ ذَلِكَ قَوَامًا﴾

**Fairness**

**Western concept**

The western concept of justice is limited in scope in the sense that it excessivel depends on the governmental decision-making ability in maintaining just order. Therefore, one standard justification for the existence of government is that it protects and enforces the rights of individuals. Further, it is argued that governments can redress any inequities in the distribution of goods and services that result from the operation of the market place<sup>2</sup>. Government, then, is responsible for ascertaining that citizens are treated fairly in the society. But it is just vitally important to know what is "fair treatment of citizens"? In contemporary interpretations of ideologies, the word "fair" has various connotations. To a

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<sup>1</sup>-AI-Quran (25 :67).

<sup>2</sup>-Geoffrey K.Fry, The Growth of Government (London: Frank class, 1979), pp.69-70.

### **The Contract of Guarantee**

conservative, for example, fairness means allowing individuals maximum opportunities to exercise their abilities and allowing them to keep what they earn in the marketplace with those abilities. Some conservatives consider it fair but people who cannot provide for themselves should suffer, along with their families <sup>1</sup>. The doctrine "from each according to his abilities to each according to his needs" implied a very different standard of fairness <sup>2</sup>.

### **Socialistic concept of 'Fair'**

On the other hand, a socialist believes that those with lower earning capacities need not suffer. The standard of fairness in most contemporary welfare states is something a mixture of the two standards.

### **Fair - according to some renowned Philosophers**

Rawls extends the notion of social contract formulated by John Locke, Jean - Jacques Rousseau and Thomas Hobbes by applying two principles of justice<sup>3</sup>:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
2. Social and economic inequalities are to be arranged so that they are both:

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<sup>1</sup>-Peters, B. Guy. American Public Policy: Promise and Performance, p.318.

<sup>2</sup>-Karl, Marx. Criticism of the Gotha Program (New York, International Universities Press, 1938,p.29:14.

<sup>3</sup>-Henry, Nicholas Public Administration and Public Affairs (Prentice Hall Inc. New Jersey, 1999),p.461

## **The Contract of Guarantee**

- A. Reasonably expected to be to everyone's advantage, and
- B. Attached to positions and offices open to all.

According to Rawls <sup>1</sup>

"Inequalities can be seen as just only if all other possible arrangements would produce lowered expectations for the least-well-off group in society".

"To help a society that is striving for equality, citizens are asked to think of their own place in society as shrouded behind a "veil of ignorance", so that it cannot be known to them in advance" <sup>2</sup>

Thus, Rawls places a strong emphasis on the decision-making procedures and the logic of the veil of ignorance.

### **'Fair' in Islamic view**

In contrast Islamic concept of fairness is not only procedural but also substantive in nature. Fairness is not only about how things are decided but what is decided. Furthermore, the veil of ignorance is simply unjustifiable in Islam in all spirit. Finally, the Rawlsian framework is applicable primarily within the context of a single society. These principles can't be applied to a broader context - global community. As Islam is a universal faith its belief in universality of social order is based on justice. This characteristic is greatly attributable to the 'universality' of

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<sup>1</sup>-John, Rawls. A Theory of Justice (Cambridge Mass: Harvard University Pres, 1971) pp.11-17.

<sup>2</sup>-Ibid,pp.11-17.

## The Contract of Guarantee

Islam i.e. it is for the entire mankind:

"And we have sent you (O Muhammad) not but a mercy for the Alamin (Mankind, jinn and all that exists)<sup>1</sup> .

Qura'an Text:

﴿وَمَا أَرْسَلْنَاكَ إِلَّا رَحْمَةً لِّلْعَالَمِينَ﴾

This universality is further elaborated as:

"And we have not sent you (O Muhammad) except as a giver of glad tidings and a warner to all mankind, but most of men know not"<sup>2</sup>

Qura'an Text:

﴿وَمَا أَرْسَلْنَاكَ إِلَّا كَافَّةً لِّلنَّاسِ بَشِيرًا وَنَذِيرًا وَلَكِنَّ أَكْثَرَ النَّاسِ لَا يَعْلَمُونَ﴾

The Holy Prophet (Peace be upon him ﷺ) following the dictates of Ouran preached the principle of universality of mankind and established an administration not only for the Muslims but for people having different beliefs and practicing different doctrines. The early Muslim history is evident that all subjects were equally treated, irrespective of their religion, beliefs and doctrines.

The element of mankind has been the core issue in the faith of Islam. Therefore, mankind has been directly addressed in the Holy Ouran at quite a few places:

"O Mankind, fear your Lord and be dutiful to Him!

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<sup>1</sup>- Al Qura'an (21:107)

<sup>2</sup>-Al Qura'an (34:28)



## The Contract of Guarantee

Verily the earthquake of the Hour (of Judgment) is a terrible thing”<sup>1</sup>

Qura’an Text:

﴿يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ إِنَّ زَلْزَلَةَ السَّاعَةِ شَيْءٌ عَظِيمٌ﴾

”O Mankind! Verily, the promise of Allah is true. So let not this present life deceive you, and let not the chief deceiver (Satan) deceive you about Allah”<sup>2</sup>

Qura’an Text:

﴿يَا أَيُّهَا النَّاسُ إِنَّ وَعْدَ اللَّهِ حَقٌّ فَلَا تَغُرَّنَّكُمُ الْحَيَاةُ الدُّنْيَا وَلَا يَغُرَّنَّكُم بِاللَّهِ الْغُرُورُ﴾

”O Mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another”<sup>3</sup>

Qura’an Text:

﴿يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَى وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ﴾

Islam consistently maintains its universal approach by laying down those broader principles in the Quran,

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<sup>1</sup>-Al Qura’an (22.1)

<sup>2</sup>-Al Qura’an (35.05)

<sup>3</sup>-Al Qura’an (49.13)

### **The Contract of Guarantee**

which cannot go obsolete with time. The expression "rule of law" is one, which, over the years, has been used to convey a wide variety of ideas. The western philosophers have strongly advocated the rule of law for maintaining social order and providing justice to the people. A.V. Dicey elaborated this concept in the later part of the 20<sup>th</sup> century. He asserted that the "rule of law" or the "supremacy of law" was a characteristic of the British Constitution, based on three separate, though related aspects. viz.

- I. That no man is punishable or can lawfully be made to suffer in bad or good except for distinct breach of the law established in the ordinary legal manner before the ordinary law of the land of man which is prerequisites for any social order passed on justice.<sup>1</sup>
- II. That no man is above the law....every man, whatever be his rank or condition, is subject to the ordinary law of the realm and emendable to the ordinary tribunals.<sup>2</sup>
- III. That the general principles of the constitution (as for example, the right to personal liberty, or the rights of public meeting) are with as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.<sup>3</sup>

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<sup>1</sup>-Dicey, A. (1965), Introduction to the Study of Law of the Constitution, London: McMillan, p.188.

<sup>2</sup>-Ibid, p.193

<sup>3</sup>-Ibid, p.195.

## The Contract of Guarantee

Dacey's concept is generally appreciated by the modern philosophers for maintaining equality on the basis of rule of law with a view to promoting social justice in a society. The emphasis is on equality of law. The Islamic concept is more advanced as it promotes equality.

On the occasion of the final pilgrimage حجة الوداع , the Prophet Muhammad (pbuh ﷺ) delivered his last sermon. One of the effects he said is recorded in these words:

"O people listen carefully, your Lord is one Lord, and there is no doubt about it. Your ancestor is one ancestor; there is no doubt about it. Listen well to my words: no Arab has any superiority over a non-Arab, and no non-Arab is superior to an Arab. No black is superior to a brown or red, and no red superior to any black. If there is any superiority in anyone, it is due to his God-fearing qualities. Have I conveyed the message?' the Prophet asked the people. The people answered from all corners, 'Indeed so! God be witness."

Islam clearly insists and demands that all officials of the Islamic state, whether they be the head or an ordinary employee, are equal in the eyes of the law. None of them is above law or can claim immunity from it. Even an ordinary citizen has the right to put forward a claim or file a legal complaint against the highest executive of the country. In the Islamic history, there are recorded events when a common citizen has questioned the highest executive of the state. Hazrat Abu Bakr on assuming the charge of Caliph expressed in his very first speech his concept about justice when he said:

## The Contract of Guarantee

"Obey me so far as I obey God and the Prophet. If I go beyond, I have not authority over you. If I err, set me right, I shall be open to conviction."

Justice means defense of the rights of individuals with courage and conviction. Weak officers have very little chance of performing their duties justly.<sup>1</sup>

O ye who believe! Be steadfast witness for Allah in equality and let not nature of a people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty of Allah. So Allah is informed of what ye do"<sup>2</sup>

Qura'an Text:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ  
وَلَا يَجْرِمَنَّكُمْ شَنَاَنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ  
لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ﴾

Thus the Islamic concept of Justice guides mankind to the avenue of universal peace and prosperity. Just and to be just is the greatest teaching of Islam. There is no distinction between the rich and the poor, high or low, as Allah has ordained' in the Holy Quran.

## Conclusion:

It has become a universal policy, in the present times, to promote and establish social orders based on justice and equality. But there are social and economic

<sup>1</sup>-Washington Irving, Mahomet & His Successors, vol.II, 1985, pg.30, Darf Publishers Ltd; London,UK

<sup>2</sup>-AI-Quran (15:8)

### **The Contract of Guarantee**

business that emerge because of the unequal distribution of resources such as wealth, abilities and others factors which bestow advantages or disadvantages causing strain on the social order. It can be safely concluded that the Islamic approach to social order based on justice promotes and advances equal scope to everyone, which the western approach has failed to do so. The Islamic approach is far more humanistic, while western attitude is more legalistic.

# The Contract of Guarantee And Islamic Banking

By

Miss Samia Maqbool Niazi \*

## 1. Introduction

Charles Dickens said, "Credit is a system whereby a person who can't pay gets another person who can't pay to guarantee that he can pay." In contrast to this, it is said that a guarantor is "a fool with a fountain pen."<sup>1</sup> The purpose of this paper is to identify with precision the contract of guarantee in law, distinguishing it from closely resembling contracts and relationships, and then to elaborate the Islamic version of this contract with equal precision along with its applications in Islamic banking as it is prevalent today.

The words "guarantee" and "guaranty" are both used as nouns as well as verbs. The noun in both cases denotes the contract of guarantee or guaranty, while the verb denotes the act of providing a guarantee or guaranty.<sup>2</sup> It appears that there is no major distinction

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\* Lecturer in Law Faculty of Shariah and Law Sector H-10, Women Campus, International Islamic University Islamabad.

<sup>1</sup>-Clive Boxer, Professional Liability Today (1988).

<sup>2</sup>-Black's Law Dictionary, s.v. "Guarantee" and "Guaranty".

## The Contract of Guarantee

between the two words, and "guarantee" is preferred in England as well as in the United States, while "guaranty" is mostly used as a noun.<sup>1</sup> The terms guarantee and surety ship are sometimes used interchangeably. According to some, surety ship is the old term for the contract of guarantee.<sup>2</sup> There is a historical distinction between "guarantor" and "surety" in that a surety was once a hostage, but there is no contemporary legal distinction and the use of both words together is redundant.<sup>3</sup> Yet, Black's Law Dictionary says that although the terms are used interchangeably, the two terms should not be confounded.<sup>4</sup> The contract of surety ship provides, it says, a joint undertaking with the principal debtor, while guarantee is an independent separate undertaking.<sup>5</sup> The Pakistan Contract Act uses the term "surety" in place of "guarantor."<sup>6</sup> The Act also states that the liability of the surety is "co-extensive with the principal debtor,"<sup>7</sup> but that is not joint liability. To avoid confusion, in this paper we will use the term guarantee and not surety ship. The word "surety" will be used in the meaning assigned to it by the Contract Act, 1872.

It may be stated at the outset that a comprehensive treatment of the topic of guarantee is beyond the scope

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<sup>1</sup>-Leaving the rest of the world confused.

<sup>2</sup>-P.J.M. Fidler, Sheldon and Fidler's Practice and Law of Banking, 11th ed. (London: Pitman, 1985), 303.

<sup>3</sup>-Andrew Terry and Des Guigni, Business, Society and the Law, 2nd ed. (Australia: Harcourt Brace, 1997), 945.

<sup>4</sup>-Black's Law Dictionary, s.v. "Guaranty".

<sup>5</sup>-Ibid.

<sup>6</sup>-Contract Act, 1872, section 126.

<sup>7</sup>-Contract Act, 1872, section 128.

## **The Contract of Guarantee**

of this paper. Accordingly, we will not discuss issues like the taking of a guarantee, that is, clauses usually incorporated in the forms of banks; variations in the position of the guarantor; variation in the terms of the original contract; and special types of guarantors. In other words, the focus of this paper will be on the nature of the contract of guarantee itself, so that it can be easily compared with its counterpart in Islamic law. The description of guarantees in law will, therefore, attempt to highlight those points that are needed for comparison.

## **2. The Contract of Guarantee in Western and Pakistani Law**

### **2.1 Parties to the Contract and Their Rights and Liabilities**

#### **2.1.1 The Contract**

A contract of guarantee is one in which the guarantor agrees to perform the obligation, or to discharge the liability, of a third party if the latter fails to do so.<sup>1</sup> There are three parties to the contract:<sup>2</sup>

1. **The principal debtor:** He is the person primarily liable for the obligation or liability whether existing or contemplated.
2. **The creditor:** He is the person entitled to the benefit of the obligation or liability.

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<sup>1</sup>-Terry and Guigni, Business, Society and the Law, 945. The Contract Act defines it as follows: "A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default." Contract Act, 1872, section 126. The words "in case of his default" distinguish it from the contract of indemnity.

<sup>2</sup>-Terry and Guigni, Business, Society and the Law, 945.



## The Contract of Guarantee

3. **The guarantor:** He promises the creditor to discharge the liability of the principal debtor if the debtor should fail to do so.<sup>1</sup> The guarantor is called surety in the Contract Act, 1872, as already stated.

The obligation that is being guaranteed is most often the payment of money. It does not have to be, and may be the performance of a particular act.<sup>2</sup> The consideration moves from the creditor and is in reality his assurance to the guarantor,<sup>3</sup> who has made the request that he will forbear for some time, that is, he will give time to the principal debtor.<sup>4</sup> This is valid, as consideration does not have to be passed on to the guarantor.<sup>5</sup>

It is obvious from the above explanation that the guarantor has secondary liability,<sup>6</sup> and the liability arises only on default by the debtor.<sup>7</sup> The contract of guarantee is a contract and not a mere unilateral promise. It is covered by the general principles of contract law as to its creation and interpretation. In addition, the special rules

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<sup>1</sup>-Ibid.

<sup>2</sup>-M.L.Barron, Fundamentals of Business Law, 3rd ed. (Australia: McGraw Hill, 2000), 340.

<sup>3</sup>-Consideration in a guarantee is defined as: "Anything done, or any promise made, for the benefit of the principal debtor." Contract Act, 1872, section 127.

<sup>4</sup>-The creditor's forbearance to sue does not discharge surety. Contract Act, 1872, section 137.

<sup>5</sup>-Fidler, Practice and Law of Banking, 305.

<sup>6</sup>-Barron, Fundamentals of Business Law, 340; Terry and Guigni, Business, Society and the Law, 945.

<sup>7</sup>-As stated in Contract Act, 1872, section 126.

## **The Contract of Guarantee**

of guarantee law also apply to it.<sup>1</sup> Although liability of the guarantor is secondary, it is not necessary that the principal debtor be sued first. The creditor can bring action against the guarantor immediately a default has occurred.<sup>2</sup> The guarantor, however, is not liable, unless the debtor defaults. A contract of guarantee may be either oral or written,<sup>3</sup> but oral guarantees are useless as far as banks are concerned. A guarantee obtained by misrepresentation or concealment is not valid.<sup>4</sup>

### **2.1.2. Liability of the Guarantor**

The liability of the guarantor commences upon default by the debtor.<sup>5</sup> In other words, as stated earlier, the liability is secondary. Thus, upon default by the debtor, the creditor need not sue the debtor; he can sue the guarantor directly.<sup>6</sup>

The scope of the liability depends upon the terms of the guarantee. The guarantee may cover the entire debt or a particular amount.<sup>7</sup> Again, the guarantee may be

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<sup>1</sup>-Barron, Fundamentals of Business Law, 342; Terry and Guigni, Business, Society and the Law, 945. The special rules for guarantee in the Contract Act, 1872 are contained in sections 127 to 147.

<sup>2</sup>-Barron, Fundamentals of Business Law, 342.

<sup>3</sup>-Contract Act, 1872, section 126. This is strange as the rule in England, much before the Contract Act was drafted, was that guarantees be written.

<sup>4</sup>-Contract Act, 1872, sections 142 and 143.

<sup>5</sup>-Barron, Fundamentals of Business Law, 342; Terry and Guigni, Business, Society and the Law, 948.

<sup>6</sup>-Barron, Fundamentals of Business Law, 342.

<sup>7</sup>-In Pakistani law, the liability of the guarantor is co-extensive with the debtor, that is, if interest is owed on an

## **The Contract of Guarantee**

specific, extending up to a specified time, or continuing.<sup>1</sup> There are guarantees that are called “all monies” guarantees. These create a very broad liability, but are discouraged by the law.<sup>2</sup> The courts in general interpret guarantees strictly, and in case the terms are vague, they tend to favour the guarantor.<sup>3</sup> Where there is more than one guarantor, they may be severally and jointly liable, and the creditor can have recourse to any one of them.<sup>4</sup>

### **2.1.3. Rights of the Guarantor after he has discharged the Liability**

When the guarantor is required to pay, he is “subrogated”<sup>5</sup> to the creditor’s rights, that is, he stands in the shoes of the creditor.<sup>6</sup> He can now sue the principal debtor for indemnity.<sup>7</sup> This is why guarantee is a contract and not merely a unilateral declaration. To protect this right of recourse of the guarantor, the creditor is placed

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amount due, the surety is liable for that too. Contract Act, 1872, section 128.

<sup>1</sup>-A guarantee that extends to a series of transactions is called a continuing guarantee. Contract Act, 1872, section 129.

<sup>2</sup>-Terry and Guigni, Business, Society and the Law, 948, citing A Pocketful of Change (Martin Report).

<sup>3</sup>-Ibid.

<sup>4</sup>-The Contract Act provides the details of such liability and requires the co-sureties to contribute equally. Contract Act, section 146 and other sections following.

<sup>5</sup>-Is entitled to.

<sup>6</sup>-This right is affirmed by the Contract Act. It says that on payment or performance, the surety “is invested with all the rights which the creditor had against the principal debtor.” Contract Act, 1872, section 140.

<sup>7</sup>-Terry and Guigni, Business, Society and the Law, 948.

## **The Contract of Guarantee**

under a duty not to modify the principal contract without the express or implied consent of the guarantor.<sup>1</sup> The guarantor also has the right to set-off any proper counter-claim against the creditor.<sup>2</sup> The subrogation also entitles the guarantor to benefit of any securities of the debtor held by the creditor.<sup>3</sup> The fact that such subrogation is not mentioned in the guarantee does not prevent the operation of such right.<sup>4</sup>

The guarantor who is obliged to pay is entitled to demand contribution from the co-guarantors.<sup>5</sup> This form of liability is not affected by multiple or separate documents of guarantee.<sup>6</sup>

### **2.2. Guarantee Distinguished From Other Contracts**

A contract of guarantee is different from indemnity in a number of respects. A contract of indemnity is where

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<sup>1</sup>-Ibid. The Contract Act says that the surety is discharged if any variation is made in the principal contract without the surety's consent. Contract Act, 1872, section 133.

<sup>2</sup>-Terry and Guigni, *Business, Society and the Law*, 948.

<sup>3</sup>-The Contract Act grants the surety the right to benefit of the securities that the creditor holds against the principal debtor. If the creditor loses or parts with such securities, the surety is discharged, even if he is not aware of such securities. Contract Act, 1872, section 141.

<sup>4</sup>-Terry and Guigni, *Business, Society and the Law*, 949, citing the decision by Lord Eldon in *Aldrich v Cooper* (1803), 32 ER 402 at 405 and Dixon J. in *Williams v Frayne* (1937), 58 CLR at 738.

<sup>5</sup>-If one of the co-sureties is released by the creditor, the other sureties are not discharged, and the released surety remains liable to the other sureties.

<sup>6</sup>-Terry and Guigni, *Business, Society and the Law*, 949, citing *A.E. Goodwin Ltd. v A.G. Healing Ltd.* (1979), 7 ACLR 481 at 490.

## The Contract of Guarantee

one party (the indemnifier) undertakes to become liable to another against any loss arising out of a transaction with a third party. The liability arises irrespective of any default.<sup>1</sup> Indemnity involves an undertaking to keep the party to whom it is given free from loss.<sup>2</sup> An indemnity contract involves two parties, while guarantee involves three.<sup>3</sup> Liability on an indemnity is primary, and is activated in the event of something happening. The guarantor, however, is liable only if the principal debtor defaults. The guarantor's liability is, therefore, secondary.<sup>4</sup> The liability on an indemnity may arise from the terms of the contract of indemnity or by legal implication.<sup>5</sup> This shows that an indemnity need not be written.

It is important to note that a distinction between a guarantee and indemnity is often blurred and to avoid problems lenders frequently require both undertakings in support of a loan.<sup>6</sup>

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<sup>1</sup>-Barron, Fundamentals of Business Law, 341; Terry and Guigni, Business, Society and the Law, 945. The Contract Act defines the contract of indemnity and says that loss may be caused by the indemnifier himself or the conduct of another person.

<sup>2</sup>-Terry and Guigni, Business, Society and the Law, 945. Such loss includes any damages paid by the promisee or costs incurred in a related suit. Contract Act, 1872, section 125.

<sup>3</sup>-Barron, Fundamentals of Business Law, 341.

<sup>4</sup>-Ibid.; Terry and Guigni, Business, Society and the Law, 945.

<sup>5</sup>-For example, an indemnity in favour of employees in respect of liabilities incurred by them in the course of employment. Terry and Guigni, Business, Society and the Law, 946.

<sup>6</sup>-Terry and Guigni, Business, Society and the Law, 946. An examination of the form of guarantee required by Pakistani

A letter of credit issued by a bank on behalf of a client to a third party in reality constitutes a guarantee, but is not strictly regarded in law as a guarantee, and particular rules of law applicable to guarantees are not applied to letters of credit as regards interpretation and enforcement.<sup>1</sup> As compared to this, a *letter of comfort*, for example one issued by a holding company about the future financial stability of its subsidiary, is not considered a guarantee and the rules of guarantee do not apply to it.

### 2.3. Discharge of the Guarantor (Surety)

The ways in which the guarantor is discharged from liability are listed below with brief explanations.

#### 1. Discharge by payment.

A guarantor is discharged from his obligation under the guarantee if the principal debtor pays the principal debt. Such discharge is revocable as the payment may be fraudulent.<sup>2</sup>

#### 2. Discharge by release of the principal debtor.

An express release of the principal debtor from all further liability will discharge the guarantor, because such release extinguishes the guaranteed debt.<sup>3</sup> This includes any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor.<sup>4</sup>

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banks may reveal that the document has both guarantee and indemnity mixed up in the same document that goes by the name of guarantee.

<sup>1</sup>-Ibid.

<sup>2</sup>-Fidler, Practice and Law of Banking, 305.

<sup>3</sup>-Ibid., 321.

<sup>4</sup>-Contract Act, 1872, section 134. This section mentions a contract between the creditor and the principal debtor.

### **3. Discharge by agreement to give time.**

The Contract Act states that the surety is discharged when a contract between the creditor and the principal debtor leads to a composition, the granting of more time, or an agreement not to sue the principal debtor, unless the surety assents to such contract.<sup>1</sup> In contrast, when the creditor makes a contract with a third person to give more time to the principal debtor, the surety is not released.<sup>2</sup> Further, mere forbearance on the part of the creditor will not discharge the surety.<sup>3</sup>

### **4. Discharge by material variation of principal contract.**

Any variance, without the surety's consent, in the terms of the principal contract discharges the surety as to transactions subsequent to the variance.<sup>4</sup>

### **5. Discharge by material variation of contract of guarantee and creditor's act or omission impairing surety's eventual remedy.**

If the creditor departs from the terms of the guarantee, like not giving a period stipulated to the principal debtor, or does any act inconsistent with the rights of the surety, so that eventual remedy against the principal debtor is impaired, the surety is discharged.<sup>5</sup>

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<sup>1</sup>-Contract Act, 1872, section 135.

<sup>2</sup>-Contract Act, 1872, section 136.

<sup>3</sup>-Contract Act, 1872, section 137.

<sup>4</sup>-Contract Act, 1872, section 133.

<sup>5</sup>-Contract Act, 1872, section 139. The section should also cover unlawful disposal of the securities held against the

**6. Discharge by change in legal position of the parties.**

The Contract Act, 1872, does not mention this however, it is settled law in England. It covers, for instance, cases of partnerships where the constitution of the partnership is subsequently changed or new partners are admitted.<sup>1</sup>

**2.4. Determination of Guarantees**

**1. Determination by notice.**

A continuing guarantee may be revoked any time as to future transactions, by notice to the creditor.<sup>2</sup> It is possible, however, to include a clause in other guarantees that they will be revoked by notice,<sup>3</sup> but it is difficult to imagine a bank accepting such a condition.

**2. Determination by death.**

In the absence of any contract to the contrary, the death of a surety operates as a revocation of a continuing guarantee with respect to future transactions.<sup>4</sup>

**3. Determination by mental incapacity or bankruptcy.**

This will apply to future and not to past transactions. Sections 11 and 12 of the Contract Act, 1872, will govern mental incapacity.

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principal debtor, as stated above, but the Act has mentioned it expressly.

<sup>1</sup>-Fidler, Practice and Law of Banking, 329.

<sup>2</sup>-Contract Act, 1872, section 130.

<sup>3</sup>-Fidler, Practice and Law of Banking, 330.

<sup>4</sup>-Contract Act, 1872, section 131.



## 2.5. Applications of Guarantees

Lenders require that the repayment of loans be guaranteed, especially where otherwise unsecured.<sup>1</sup> Wherever an amount has to be repaid, guarantees are obtained. As a guarantee is the simplest form of security it is for that reason the commonest.<sup>2</sup> A guarantee, however, is not a particularly safe form of security.<sup>3</sup> Unless a charge is taken over some form of property, bankers regard a loan secured by a guarantee as an unsecured loan.<sup>4</sup>

## 3 .The Contract of Guarantee in Islamic Law

The broad features of the contract of guarantee in law have now been identified. These features will enable us to compare this contract with its counterpart in Islamic law. For purposes of comparison we will rely mostly on Shari, 'ah Standard No. 5 issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). The title of the standard is D,ama, na, t. ضامات. The word has been translated as "Guarantees."<sup>5</sup> Where needed, we will also refer to the works of the earlier jurists and modern scholars.

### 3.1. The Meaning of the Word D,ama, n ضمان

The word d,ama, n ضمان in its literal modern sense means: to be or become responsible; be guarantee; give security or guarantee; ensure; safeguard; to insure; to be

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<sup>1</sup>-Terry and Guigni, Business, Society and the Law, 945.

<sup>2</sup>-Fidler, Practice and Law of Banking, 303.

<sup>3</sup>-Ibid.

<sup>4</sup>-Ibid.

<sup>5</sup>-See the English translation of Shari, 'ah Standard No. 5 issued by the AAOIFI, on page 53.

jointly liable; and to have joint responsibility.<sup>1</sup> When we examine the literature on *fiqh* فقه, we find the term *dama*, *n* ضمان being used in almost every area of the law. Thus, it is found in criminal law, in the sense of paying compensation for an injury caused. The meaning of compensation is found in other areas of the law as well. Another meaning is that of liability, which is also the modern meaning. Thus, we say "so and so will be held liable for this" or "will pay compensation for this." It is also used in the sense of the capacity or readiness "to bear loss" as in the *qa, 'idah*: "*al-khara, ju bi'd, .d, .ama, n*." Nevertheless, despite this variety in meanings, we do find the earlier Muslim jurists using the term *d, .ama, n* for the contract of guarantee in Islamic law. This is the contract of *kafa, lah* where it applies to wealth and debts, that is, *kafa, lah bi'l-ma, l*.<sup>2</sup>

### 3.2.D,ama, n and Shari, 'ah Standards for Islamic Banks

Shari, 'ah Standard No. 5, referred to above, uses the term *d,ama, na, t* (guarantees) in the modern sense and then includes a large number of contracts under it that are not guarantees, but independent contracts, even though their purpose is the provision of security or collateral. The use of the term *d,ama, n* in this imprecise way brings vagueness into the study of Islamic law and

<sup>1</sup>-Hans Wehr, A Dictionary of Modern Written Arabic, s.v. "d,ama, n".

<sup>2</sup>-See Abu, Bakr al-Ka, sa, ni, , Bada, 'i al-S,ana, 'i, vol. 4, 600 (see also the Urdu translation of this book). Wabbah al-Zuhayli, attributes the use of this term to al-Ma, wardi, in a classification given by him. See Wabbah al-Zuhayli, , al-Fiqh al-Isla, mi, wa Adillatuhu, vol. 6, 4141.

## The Contract of Guarantee

we feel that there is a need to be more precise. The following contracts and transactions are included in this standard under the heading of guarantees.<sup>1</sup>

1. Guarantees in contracts of trust (*ama, nah*).
2. Guarantees for existing leased properties.
3. Personal guarantees (*kafa, lah*).
4. Pledges (*rahn*).
5. Letters of guarantee.
6. Documentary credits.

### 3.3 .Types of Kafa, lah: Surety and D,ama, n

ضمان

#### 3.3.1 Examining the Evidence (Dali, l) for Kafa, lah كفالة

In almost every book on fiqh, whether classical or modern,<sup>2</sup> the following verse of the Qur'a, n [Qur'a, n 12:72] is quoted as evidence for the legal validity of the contract of guarantee or *kafa, lah*.

They said: "We miss the great beaker of the king; for him who produces it, is (the reward of) a camel load; I will be bound by it."

The argument advanced is that as the word *za'i, m* means *kafi, l* (surety), therefore, the contract of *kafa, lah* is legally valid. We find it difficult to agree with this reasoning. An examination of the transaction that is the

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<sup>1</sup>-See AAOIFI, Shari, 'ah Standards: 1423 H-2002, 57-67.

<sup>2</sup>-See Shari, 'ah Standard No. 5, 74; Wahbah al-Zuhayli, vol. 6, 4141; the verse is relied upon for *kafa, lah* in most books of fiqh, as already stated.

## The Contract of Guarantee

subject matter of the verse reveals that this is not the contract of *kafa, lah*, but what is called a "general offer," a unilateral contract that becomes binding on both parties once the promisee completes the act required. In Islamic law it goes by the name of *ju'a, lah*, also *ji'a, lah*. In this case, the promisor is merely saying to the promisee that if he can bring the king's beaker he will have a camel load. The contract would have been valid even without the words "I will be bound by it." In our view, this evidence does not justify the contract of *kafa, lah*.

Thereafter, a tradition is quoted to support the contract. This is the tradition of Salmah ibn Akwa' سلمة بن الأكوع in which the Prophet (ﷺ) refused to offer funeral prayers over the indebted deceased till one person offered a guarantee for its repayment.<sup>1</sup> This tradition has another problem even though the contract of guarantee is clearly mentioned. It implies that the consent of the principal debtor is not required (dead in this case). If consent is not required, it is difficult to see how the guarantor will recover the debt from the principal debtor.

Consensus of the jurists (*ijma, 'ah*) is also claimed for the contract.<sup>2</sup> The consensus also upholds the illegality of charging for the provision of guarantee, because guarantee is a kind of a loan to the principal debtor and charging for it will convert it into a contract of *riba, 'ah*.<sup>3</sup>

The evidence for guaranteeing an unknown amount or a future obligation is the tradition al-za'ym-Algarim. It may be translated as: "The guarantor is liable (for the

<sup>1</sup>-The tradition is recorded by al-Nasa'i, Ibn Ma'jah and al-Bayhaqi in their Sunan.

<sup>2</sup>-See Shari'ah Standard No. 5, 74.

<sup>3</sup>-Ibid.

## The Contract of Guarantee

debt).<sup>1</sup> The Hanafī jurists rely on this tradition for the legality of *kafa, lah* كَفَالَة.<sup>2</sup> As the tradition conveys an unqualified meaning, it is considered to cover all eventualities.

### 3.3.2. Types of Kafa, lah

Kafa, lah in fiqh is primarily of two types.<sup>3</sup> The first is kafa, lah bi'nafs كَفَالَة بِالنَّفْس or surety for the person. This is the old contract of surety ship for producing the person, and in which the guarantor sometimes became a hostage.<sup>4</sup> It can be compared to the provision of bail in criminal cases today. The other type is kafa, lah bi'l-mal كَفَالَة بِالْمَال or standing surety for debts. This second type is the subject matter of this paper and we shall focus on this type.

## 3.4. The Liability of the Surety and the Principal Debtor in Islamic Law

### 3.4.1. The Nature of Kafa, lah and Liability

In order to understand the liability of the principal debtor and the surety in Islamic law, it is essential to see how the nature of the contract of *kafa, lah* is understood and how its meaning is traced in fiqh فقه. The meaning of *kafa, lah* is understood in two ways:

<sup>1</sup>-The tradition is recorded by Ah, mad ibn H, anbal, Abu, Da, wu, d, al-Tirmidhi and others.

<sup>2</sup>-Abu, Bakr al-Ka, sa, ni, , Bada, ' al-S, ana, ' , vol. 4, 600.

<sup>3</sup>-For the details of the two types of kafa, lah, see Abu, Bakr al-Ka, sa, ni, , Bada, ' al-S, ana, ' , vol. 4, 600 onwards and Wahbah al-Zuhayli, , al-Fiqh al-Isla, mi, , vol. 6, 4141 onwards.

<sup>4</sup>-As stated above.

## 1. Merger of Liabilities With Respect to the Demand:

The first way of considering the nature of *kafa, lah* is to treat it as the merger of liabilities for purposes of demand of the debt for the parties, but not with respect to the debt itself. The debt remains the liability of the principal debtor as it was originally. The surety, however, becomes subject to demand from the creditor just like the principal debtor. This case is similar to the separation of demand for the debt in the case of the agent and the principal in the case of a *bay'* (sale). The *h,,uqu, q* and the *h,,ukm* are separated. Likewise, in this case the demand is directed towards the surety when the debt remains attached to the *dhimmah* (liability) of the *as,i, l* (principal debtor). It may also be compared to *rahn* (pledge) where the right of disposal is separated from the ownership of property.

## 2. Merger of Liabilities With Respect to the Debt.

The second way is to merge the liability (*dhimmah*) of the surety with the liability of the principal debtor for the debt itself. The basis here is that *kafa, lah* here is a credit given to the principal debtor attached to his *dhimmah* and the obligation for meeting the demand of the debt. The obligation for meeting this demand depends upon the original debt. In this situation, even though the debt is due from them both, the demand can be directed to either one of them, just like the case of the usurper who has usurped from the first usurper (*gha, s,,ib*). Each one of them is liable for the value of the property, but the property itself is due only from one of them.<sup>1</sup>

<sup>1</sup>-Abu, Bakr al-Ka, sa, ni, , *Bada, T al-S,,ana, T*, vol. 4, 611; Wahbah al-Zuhayli, , *al-Fiqh al-Islam, mi, ,* vol. 6, 4144.

### 3.4.2. Liability in *kafa, lah* Compared to Liability in *h,awa, lah* حوالة

To better understand the meaning of *kafa, lah*, it needs to be compared to *h,awa, lah* (transfer of debt). *H,awa, lah* and its derivative meanings convey the idea of transfer from one location to another. The legal meaning is the transfer of the debt from the liability (*dhimmah*) of the principal debtor to that of another person within a relationship of trust and creditworthiness. The jurists disagree about the legal implications of the two contracts.

#### 1. The *H,anafi, lah* view.

According to the *H,anafi, lah* jurists, the difference between *kafa, lah* and *h,awa, lah* is that in *kafa, lah* the principal debtor is not absolved of liability (he remains liable for the debt), while in *h,awa, lah* the principal debtor is no longer liable for the debt after the contract of *h,awa, lah* is concluded.<sup>1</sup>

#### 2. *Ibn Abi, Layla, 's* view. ابن أبي ليلى

In *Ibn Abi, Layla, 's* view, the contract of *kafa, lah* absolves the principal debtor of liability as in the case of *h,awa, lah*. The basis is that the debt is established against the liability (*dhimmah*) of the surety and this necessarily absolves the principal debtor of liability. The reason is that as long as one *dhimmah* holds the debt completely, all other *dhimmas* have to be free of it. If it moves from this to

<sup>1</sup>-Abu, Bakr al-Ka, sa, ni, *Bada, 'i al-S,ana, 'i*, vol. 4, 612; Wahbah al-Zuhayli, *al-Fiqh al-Islam, i*, vol. 6, 4165.

another *dhimmah*, the first one becomes free. As the debt is established against the *dhimmah* of the surety, the *dhimmah* of the principal debtor becomes free. Thus, in his view, in both *h,awa, lah* and *kafa, lah*, the principal debtor is absolved of liability.<sup>1</sup>

3. **Ima, m Zufar's** **إمام زفر** **view.**

As distinguished from this view, Ima, m Zufar maintained that in the contract of *h,awa, lah* the principal debtor is not absolved of liability. Thus, in both *h,awa, lah* and *kafa, lah*, the principal debtor remains liable. In his view, the only thing that is added through the contracts is that the demand for the debt has been strengthened or doubled, not that it has been removed altogether from one of the parties.<sup>2</sup>

4. **The Response of the H,anafi,** **jurists.** To counter these arguments, the H,anafi, \_ jurists maintain that each contract, that is, *h,awa, lah* and *kafa, lah*, has been assigned a different name and this indicates different legal effects. Likewise, the contract of *salam* has been given a specific name for legal effects that are implied by the term used for the contract. The legal effect is the immediate payment of the price and its possession within the session of the contract. It also implies the delay of the goods bought. The meaning of *s,arf* is the payment of each

<sup>1</sup>-Abu, Bakr al-Ka, sa, ni, Bada, 'i al-S,ana, 'i, vol. 4, 612; Wahbah al-Zuhayli, *al-Fiqh al-Islami*, vol. 6, 4166.

<sup>2</sup>-Abu, Bakr al-Ka, sa, ni, Bada, 'i al-S,ana, 'i, vol. 4, 612; Wahbah al-Zuhayli, *al-Fiqh al-Islami*, vol. 6, 4166.



## The Contract of Guarantee

counter-value within the session. In the same way the contract of *kafa, lah* conveys the meaning of merger of liabilities. The implication is that one *dhimmah* be merged with another. This is not possible if the principal debtor is absolved of liability. As distinguished from this *h,awa, lah* means transfer, and this meaning is realised when the liability is transferred from the *dhimmah* of the principal debtor.<sup>1</sup>

The above analysis leads the jurists to conclude that the creditor has the choice to claim the debt from any of the two debtors, the principal debtor or the surety, and to make a demand upon any of them. It may be added here that under certain circumstances the principal debtor can be absolved of liability in a contract of *kafa, lah* through stipulation. From this we may conclude that primary and secondary liability can also be varied.<sup>2</sup>

### 3.5. The Rules of the Contract of Guarantee (*D, ama, n*) in Islamic Law

The rules for *kafa, lah* will now be stated very briefly with the purpose of comparison with the contract of guarantee in Western law. For this purpose we have relied upon the *Shari, 'ah Standard* alone, although most of the rules can be derived from the books of *fiqh*, both earlier and modern.

1. *Kafa, lah* is of two types: *Kafa, lah* that is with the consent of the principal debtor and *kafa, lah* that is without the consent of the principal debtor. The banks

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<sup>1</sup>-Abu, Bakr al-Ka, sa, ni, , *Bada, 'i' al-S, ana, 'i'*, vol. 4, 612; Wahbah al-Zuhayli, *al-Fiqh al-Islami*, vol. 6, 4167.

<sup>2</sup>-See Wahbah al-Zuhayli, *al-Fiqh al-Islami*, vol. 6, 4167.

## The Contract of Guarantee

only accept the form in which the principal debtor has given his consent.<sup>1</sup>

2. It is permitted to fix a period of the guarantee and to determine an amount to be paid.<sup>2</sup>
3. It is also permitted to make the contract conditional and to associate it with a future obligation.<sup>3</sup>
4. It is not permitted to charge an amount for providing a guarantee, but the guarantor is entitled to the costs incurred.<sup>4</sup>
5. It is permitted to guarantee a debt that is not determined as yet or one that has not become due as yet.<sup>5</sup>
6. It is permitted for the creditor to demand the debt, at his choice, from the principal debtor or from the guarantor.<sup>6</sup>
7. It is permitted to the guarantor to set an order in which the demand is made, that is, the creditor demanding the debt from the principal debtor, and upon default, demanding it from the guarantor.<sup>7</sup> This means that secondary liability for the guarantor can be created, but is not essential and he may consent to have primary liability.
8. If the creditor absolves the principal debtor of the debt liability, the guarantor's liability is terminated. If

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<sup>1</sup>-Shari, 'ah Standard No. 5, item 3/1/2.

<sup>2</sup>-Ibid, item 3/1/4.

<sup>3</sup>-Ibid.

<sup>4</sup>-Ibid, item 3/1/5.

<sup>5</sup>-Ibid, item 3/2.

<sup>6</sup>-Ibid, item 3/3/1.

<sup>7</sup>-Ibid.

## The Contract of Guarantee

the creditor absolves the guarantor of liability, the liability of the principal debtor still stands.<sup>1</sup>

9. The contract of *kafa, lah* may be part of a loan agreement or be independent of it.<sup>2</sup>

10. It is permitted to have more than one guarantor.<sup>3</sup>

11. In the case of future obligations, the guarantor may determine the guarantee by notice served upon the creditor, but this is done before the debt liability has arisen.<sup>4</sup>

The Standard does not discuss ways in which the contract of guarantee is determined. A perusal of the books of *fiqh* shows that this is almost the same or the same rules can be easily derived.<sup>5</sup> We are not dealing with this issue here.

## 4. Conclusion

A comparison of the contract in both legal systems shows that the contract is almost exactly the same. This does not mean that there are no problems when the contract is compared with *fiqh* literature. For instance, the jurists may not allow a guarantee for an unknown debt or for a debt that has not come into existence as yet.<sup>6</sup>

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<sup>1</sup>-Ibid. item 3/3/2.

<sup>2</sup>-Ibid., item 3/3/3.

<sup>3</sup>-Ibid., item 3/1/1.

<sup>4</sup>-Ibid., item 3/1/4.

<sup>5</sup>-For example, Abu Bakr al-Ka, sa, ni, discusses it in Bada, 'I al-S, ana, 'I, vol. 4, on page 613.

<sup>6</sup>-See *ibid.*, 606. The Author stipulates that the debt should be known.

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